IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.162 OF 2007
WITH
CIVIL APPLICATION NO.364 OF 2007

Shri. Murlidhar Dharmaji Jagtap,
Age 62 years,
Occupation-Agriculture/Advocate,
Residing at Building No.H-5, Block No.78,
Maharashtra Housing Board, Gokhale Nagar,
Pune 411 016.

....Appellant.

Vs.

Smt.Chandrabai Limbaji Jagtap,
Age 70 years, Occ. Household,
Residing at Rakh,Tal. Purandar,
District-Pune.

....Respondent.

Mr.S.P.Thorat for the Appellant.

Mr.P.B.Shah for the Respondent.

CORAM : A.M.KHANWILKAR, J.
DATE : 25th October, 2007.

ORAL JUDGMENT :

1. Heard counsel for the parties. As substantial question of law arises for consideration, appeal is admitted. By consent, appeal is taken up for final disposal forthwith. I shall presently formulate the substantial question of law.

2. Briefly stated, the second appeal takes exception to the Judgment and Order passed by the Principal District Judge, Pune in Civil Appeal No.757 of 2004. That appeal

emanates from the decision of the Joint Civil Judge, Sr.Division, Pune dated 28.10.2006 on the Misc. Application No.722 of 2002 filed by the respondent. The respondent claimed to be the wife of Limbaji. On that assertion, she prayed for issuance of Heirship certificate under Bombay Regulation Act as also for Succession Certificate. That application was resisted by the appellant, who incidentally happens to be the real brother of deceased Limbaji.

3. In view of the contest between the parties, the Trial Court proceeded to record the evidence of the witnesses produced by the respective parties and on analysing the oral as well as documentary evidence on record, by Judgment and Order dated 28.10.2004, application preferred by the respondent came to be allowed. Accordingly, the Trial Court issued the Heirship Certificate as also the Succession Certificate in favour of the respondent.

4. The principal argument canvassed on behalf of the appellant before the Trial Court was that the respondent has not been able to establish the factum of performance of Saptapadi in relation to the marriage between the respondent and the deceased Limbaji. The evidence as produced by the respondent falls short on the point of performance of Saptapadi during the said marriage. In

absence of such evidence, it necessarily follows that the respondent was not legally wedded wife of the said Limbaji. Indeed, the appellant raised other contentions before the Lower Court which were also negatived. The appellant accordingly, carried the matter in appeal before the District Judge, Pune being Civil Appeal No.757 of 2004. Essentially two contentions were raised in the appeal. The first contention was that, in view of the dispute raised between the parties matter should have been tried as regular civil suit. That contention has been negatived by the Appellate Court on the reasoning that the application in question was governed by the procedure of Section-373 of the Indian Succession Act and not Section-295 thereof. Besides, the Appellate Court has recorded that the Trial Court conducted a full fledge enquiry and permitted the parties to adduce evidence and gave full opportunity including to cross examine the concerned witness. Accordingly, the first contention of the appellant has been rejected. So far that finding is concerned, I see no infirmity in the conclusion or approach of the Trial Court in that regard. That view will have to be upheld.

5. The controversy that needs to be addressed in the present appeal is in the context of the stand taken before the Appellate Court. It was categorically asserted on behalf of the appellant that the respondent

had failed to establish that she was legally wedded wife of deceased Limbaji. To buttress this submission, the appellant had relied on the evidence adduced by the respondent. According to the appellant, said evidence was inadequate to record a finding on the fact that the respondent was legally wedded wife of deceased Limbaji. The Appellate Court has considered this aspect in Paragraphs 5 and 6 of the impugned judgment which read thus:

> "5. Mr.Zende, secondly submits that it was necessary for the respondent to prove her marriage to Limbaji by establishing all the rituals of the marriage including Saptapadi. According to him, the respondent has failed to establish all the rites and rituals of the marriage with Limbaji. Firstly, as seen from the cause title of the applications, the respondent, at the time of the application was an old lady of 70 years. She is not seen to be a literate woman. She has deposed in categorical terms that she was married to Limbaji. Considering her age and background, it cannot be expected that she would give all the details of her marriage ceremony. At the same time, she is supported by the three orders passed by the three different courts certifying

her status as the wife of Limbaji. Mr. Zende then submits that it is well established that decision of the Criminal Courts are not binding on the Civil Courts. Therefore, the Trial Court ought to have ignored the three decisions and had insisted that the respondent independently establishes the fact of marriage.

6. There can be no dispute as regards the proposition advanced by Mr. Zende that the decisions of Criminal Courts are not binding on the Civil Courts. However, as has rightly been submitted by Mr.K.R.Shah, the same can always be taken into consideration as the supporting material. If one peruses the impugned order, the Trial Court has regarded the three decisions produced by the respondent as a supporting material only".

6. After Having considered the rival submissions, the substantial question that arises for my consideration is:

Whether the evidence adduced on behalf of the respondent, in Law, can be said to be sufficient to record a finding on the fact that Saptapadi was performed so as to find that the respondent

is legally wedded wife of Limbaji?

7. The Appellate Court in the first instance has clearly recorded that there is no documentary evidence to establish the factum of marriage between the respondent and the deceased Limbaji. In so far as ocular evidence is concerned, the Appellate Court has not recorded that respondent has spoken about the performance of Saptapadi during such marriage. It is well established position that to establish the factum of a valid marriage of Hindu, it is necessary to prove the performance of Saptapadi during the relevant time. If the respondent has not spoken about such event, the fact that the respondent claims to be the wife of deceased Limbaji cannot be the sole basis to hold that she is legally wedded wife. In other words, performance of Saptapadi is the quintessence for a legal and valid marriage between the Hindus. The Appellate Court however, has not considered this aspect at all. In fact, even the Trial Court has not recorded a clear finding of fact in that regard. The Appellate Court however, proceeds to examine the matter by giving benefit to the respondent of her old age. That cannot be the basis to conclude that there is evidence of legal and valid marriage between the respondent and Limbaji. Indeed, the Appellate Court had also adverted to the decision of the Criminal Court wherein the contention of

Limbaji that the respondent was not his legally wedded wife has been negatived; and it has been found that the respondent was the wife of Limbaji. It is well established position that the decision of the Criminal Court is not binding on the Civil Court especially when the Civil Court is called upon to address the issue as to whether there is legal and valid marriage between the parties? The Appellate Court has rightly noted that principle, but proceeds to hold that the lower court has used the decision of the Criminal Court only as supporting material. Indeed, those decisions can be the supporting material-provided the basic evidence of performance of marriage and in particular, performance of Saptapadi by the parties at the marriage, is placed on record by the concerned party asserting to be the legally wedded wife. In absence of that position, Civil Court cannot decide the issue in question solely on the basis of the opinion recorded by the Criminal Court. In absence of substantive evidence brought on record by the respondent in the Civil proceedings on material facts to constitute legal marriage, the decision of the Criminal Court will be of no avail even though the same can be looked into as supporting material to corroborate such substantive evidence.

8. Instead of reappreciating the entire evidence for the first time before this court, in my opinion, it is

appropriate that parties are relegated before the first Appellate Court where the parties will get sufficient opportunity to agitate the issues that may be relevant for consideration of the appeal of the restored appeal. In addition, it will be open to the parties to adduce further evidence before the Appellate Court for which purpose formal application be made before the Appellate Court, who in turn will decide the same in accordance with law. All questions in that behalf are left open.

9. Appeal is accordingly, allowed. No order as to costs. The impugned Judgment and Order is set aside and the appeal is restored to the file of the first Appellate Court for its decision on merits on the basis of the observations made in this decision.

10. The parties shall appear before the first Appellate Court on 10.12.2007 when the Appellate Court may proceed with the hearing of the appeal on the same date or such other date as may be convenient to it, while ensuring that the appeal is finally disposed of on or before 31.3.2008.

11. In view of the above order, Civil Application is disposed of.

(A.M. KHANWILKAR, J.)